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In the Supreme Court of the United States

Supreme Court, U. S.
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OCTOBER TERM, 1971

NOS. 71-789
71-796

UNITED STATES OF AMERICA,
Respondent,

vs.

GEORGE KASTENBAUM and NORMAN JACOBS,
Petitioners.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

GEORGE KASTENBAUM
in PRO PERSONAM
16870 N.E. 19th Avenue
North Miami Beach, Florida 33162
and
NORMAN JACOBS,
in PRO PERSONAM
16870 N.E. 19th Avenue
North Miami Beach, Florida 33162

MIAMI REVIEW — 371-4853 — 377-3721

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PETITION FOR REHEARING

Petitioners, GEORGE KASTENBAUM and NORMAN JACOBS, pursuant to Rule 58 (2) of the Supreme Court Rules, respectfully move this Court for an order (1) vacating its order of February 28, 1972 denying their respective petitions for writs of certiorari, and (2) pray for a rehearing so that this Court will grant their petitions.

REASONS FOR GRANTING REHEARING AND ISSUING WRITS

Petitioners believe that substantial grounds exist so as to warrant this Court issuing writs of certiorari.

For reasons immaterial to your petitioners filing this joint petition for rehearing, your petitioners submit that one question posed to both the District Court and the Fifth Circuit Court of Appeals was not presented to this Court and submission of this question (based upon the interstate nexus necessary to support federal jurisdiction) may result in issuance of the writs.

Petitioners submit that this petition for rehearing is directed only to grounds specified herein.

An intervening circumstance of controlling importance is the decision on December 20, 1971, (Jacobs' petition was filed 12/17/71 and Kastenbaum's petition was filed 12/19/71) of this Court in *United States v. Bass*, no: 70-71 (not as yet reported) which, on the interstate jurisdictional question posed hereinbelow, parallels the approach to federal criminal jurisdiction so as to warrant a review of this case, if the Court believes constitutional questions of great importance require issuance of the writs albeit petitioners have not previously presented the question in their original petitions. (*White v. Texas*, 309 U.S. 631, 310 U.S. 530).

SUPPLEMENTAL STATEMENT OF FACTS OF THE CASE

Petitioners reiterate and restate the respective Jurisdictional Statements, Statutes Involved and Statements of the Case as appear in petitions 71-789 and 71-796 as if herein set out in haec verbae. Petitioners would supplement statements of the case with the following, none of which can be disputed.*

Kastenbaum advised Casella that a nightclub tour operator was not legally permitted to own buses or bus permits, it being illegal by Miami Beach Ordinance. (Tr. 302, 891) (App. 1).

Kastenbaum told Casella that it would be a completely new business venture he would be going into that would obtain a bus permit and as part of its operation, could contract buses to Kastle Tours and do business with any other corporation, person or firm. (Tr. 302-303) (App. 2).

Casella and Kastle Tours were defunct, out of business and not in operation when Casella went back to Kastenbaum five weeks after his first visit (Tr. 147) (App. 2) (he was also not in business on his first visit (Tr. 585) (App. 2)) to Kastenbaum and on this second visit he was sent by the police to offer police money to Kastenbaum for a permit. (Tr. 165-168, 359-362, 625-629, 497-498) (App. 3-10).

The bus permit that Casella and the F.B.I. agent were going to get was a valuable property right. (Tr. 248, 254, 892-894) (App. 10-11).

*References throughout are to the trial transcript (Tr.) and the Appendix attached to this Petition (App.).

There was no evidence submitted by the government, nor could there be any reasonable inference from any of the evidence, that either petitioner had anything at all to do with Casella going out of business before he went back to Kastenbaum at the suggestion of the police and with the offer of police money for a bus permit. (Tr. 418-419, 440-441) (App. 11-12).

QUESTIONS

I. SINCE CONGRESS CLEARLY INTENDED THE HOBBS ACT TO FREE INTERSTATE COMMERCE FROM ANY DESTRUCTIVE BURDEN, DOES A POTENTIAL EXPANSION OF INTERSTATE COMMERCE FALL WITHIN THE CRIMINAL SANCTIONS OF THE ACT?

II. DID CONGRESS INTEND THE HOBBS ACT TO CONTROL AN ACTIVITY AFFECTING "NO BUSINESS"?

Petitioners suggest that the above questions should be answered in the negative. Since the two issues are inextricably connected, they will herein be argued together.

Petitioners posed the jurisdictional question of interstate commerce to the Fifth Circuit Court of Appeals and in their entire twenty-seven page opinion, the Fifth Circuit answered the question as follows:

> "There is ample evidence that Casella advertised his bus tours at Miami Beach and in many states other than the State of Florida; that in the

> short time he operated his tours persons from several states other than Florida took the tours, and that the acts of Jacobs and Kastenbaum in endeavoring to further the object of conspiracy obstructed, delayed, or affected interstate commerce." (page 24) (page 18a of Appendix of Kastenbaum's original Petition for Writ of Certiorari)

The Fifth Circuit did in no way whatever make any statement as to what act of either Jacobs or Kastenbaum obstructed, delayed or affected interstate commerce; regardless, said Circuit clearly overlooked a jugular point regarding interstate commerce—Casella and Kastle Tours *were not in business* when they visited Kastenbaum or Jacobs.

"The fear of economic loss" contention, as indicated in the Fifth Circuit's supplemental opinion (Appendix—pages 22a-23a of Kastenbaum's original petition for writ of certiorari) (App. 13) is utterly illogical since Casella had no money and his business was defunct when he went to Kastenbaum. The Fifth Circuit completely contradicted itself by stating in its original opinion:

> "The fact that Casella and the F.B.I. Agents did not intend to pay the $50,000 to Kastenbaum did not make such conversations constitutionally protected." (Page 19a of Appendix of Kastenbaum's original petition for Writ of Certiorari)

Therefore, it is incontestable that Casella could have no fear of economic loss. We state this only in relation to the interstate jurisdictional question, to be argued, *infra*. The government should readily acknowledge that neither Kastenbaum nor Jacobs had anything at all to do with Casella going out of business.

ARGUMENT

This Court has stood fast in criminal cases for the proposition that a person is denied due process where the jurisdictional threshhold is totally devoid of evidentiary support, rendering a conviction thereunder unconstitutional. *Thompson v. City of Louisville*, 368 U.S. 199; *Garner v. Louisiana*, 368 U.S. 157, 163; *Washington v. U.S.*, 357 U.S. 348; *Gregory v. City of Chicago*, 394 U.S. 111, 22 L.Ed.2d 134, 89 S.Ct. 946.

The constitutionality of the Hobbs Act rests upon the commerce clause of the United States Constitution; *Nick v. United States*, 122 F.2d 660, 668 (8th Cir. 1941), cert denied 314 U.S. 687 (1941). But, while the power of the Congress under the commerce clause is broad, Congress, in enacting legislation under the commerce clause, *must intend to exercise federal dominion over the area which is adjudicated by authority of that legislation*: otherwise, the power to regulate the activity is reserved to the states. Thus, in *NLRB v. Jones and Laughlin Steel Corporation*, 301 U.S. 1, 30 (1937), the Supreme Court observed:

> "The authority of the federal government may not be pushed to such an extreme, as to destroy the distinction which the commerce clause itself establishes between commerce 'among the several states' and the internal concerns of a state. That distinction between *what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.*" (emphasis supplied)

Even more recently, in *Knapp v. Schweitzer*, 357 U.S. 371, 375 (1958) this Court observed:

> "It is relevant to remind that our Constitution is one of particular powers given to the national government with the powers not so delegated reserved to the states or, in the case of limitations upon both governments, to the people. Except insofar as penal remedies may be provided, under the explicit authority to 'make all Laws which shall be necessary and proper for carrying into Execution' the other powers granted by Art. 1, Sec. 8, *the bulk of authority to legislate on what may compendiously be described as criminal justice, which in other nations* belong to the central government, *is under our system the responsibility of the individual states.*" (emphasis supplied)

As will be conclusively demonstrated, Congress never intended to control the activity which resulted in petitioners' convictions—nor did it ever consider the possibility of such a result—by enacting the commerce clause provision of the Hobbs Act. Supportive of the commerce clause question is a recent decision of this Honorable Court decided on December 20, 1971, *United States v. Bass*, case no: 70-71. One can only conclude from *Bass* that a strained interpretation of the interstate commerce element so as to support federal jurisdiction would "mark a major inroad into a domain traditionally left to the states." Although *Bass* turned on the ambiguity of a section of the Omnibus Crime Control and Safe Streets Act, this Court indicated that because the sanctions under the Act were criminal, it

must be liberally interpreted in favor of a narrow reading; however, this Court in its opinion, has manifested that *any* federal offense *must* have a nexus with interstate commerce, 40 LW at 4105; and the inclusion of any phrase regarding interstate commerce "mirrors the approach to federal criminal jurisdiction reflected in many other federal statutes," citing the Hobbs Act as one of these federal statutes. (40 LW at 4102, f.n. 8) This Court in *Bass*, supra, reiterated that "this Congressional policy is rooted in the same concepts of American federalism which has provided the basis for judge-made doctrines." (see: e.g. *Younger v. Harris*, 401 U.S. 37.) *Bass* cited *Rewis v. United States*, 401 U.S. 808, 28 L.Ed. 2d 493, 91 S.Ct. 1056, wherein an expanded interpretation of the Travel Act as regards interstate commerce was struck down so as to affirm there must be a reasonable interstate commerce nexus to support federal jurisdiction.

Examination of all of the evidence which was offered by the government in the case at bar to establish the element of interstate commerce substantiates that there could not conceivably be any nexus with interstate commerce which would support federal jurisdiction, under the terms of *Bass*.

On motion for directed verdict by defendant's counsel, regarding the indispensable element of interstate commerce, the trial court stated:

> "The thrust of the defendant's argument, Mr. Walsh, as I conceive it, is assuming arguendo that you did establish that they were actually engaged in interstate commerce during the period of time

that they were operating this business, nevertheless the evidence shows that at the time they first talked to Mr. Kastenbaum and thereafter they were not operating this business and therefore they were not in interstate commerce and (721) therefore, any action could not affect interstate commerce because they weren't in it. That is the thrust of their argument as I see it." (Tr. 720-721)

The totality of the evidence offered by the government to support the indispensable element of interstate jurisdiction was for the period when Casella was in business, (Tr. 147) (App. 2),[1] *but no evidence or testimony was*

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[1]One witness, Carol Ann Eustis (Tr. 67-68) (App. 16) testified that she had come from Ohio in December of 1968 to Miami Beach and while in Miami Beach had taken one of Kastle Tours. She received a brochure for the tour at a Miami Beach hotel after she arrived (Tr. 68-69) (App. 16). She further testified that the existence of Kastle Tours had no bearing on her trip to Miami Beach (Tr. 74-75, 77) (App. 17-18).

William I. Silverman (Tr. 339) National Chairman of the National Wiping Cloth Association, testified he had responded on 1/9/69 to a letter written by Mrs. Casella to him on 1/4/69, but the letter had nothing to do with the decision of the association to hold its meeting in Miami Beach (Tr. 345) (App. 17), a decision which had already been made prior to receipt of Mrs. Casella's letter.

Mrs. Casella testified that she wrote to persons representing convention groups, already committed to coming to Miami Beach asking them to utilize Kastle Tours when they arrived and she identified letters she had written to them. (g. exhibit 15). Of course, none of the groups she wrote to even knew of Kastle Tours existence. (Tr. 583, 74-75) (App. 17-18). There was also testimony that some of the people who took the tour while in Miami Beach paid by checks drawn on out-of-state banks or with travelers checks purchased out-of-state.

Omitting for the purpose of our argument, that Casella was not in business, let us examine the type of evidence presented by the government so as to decide whether such evidence can bridge the threshhold jurisdictional question of interstate commerce.

offered to show that any act by either Kastenbaum or Jacobs even speculatively had any effect upon interstate commerce during the aforesaid time of Kastle Tours operation.

The nub of federal jurisdiction and the reason Congress passed the Hobbs Act was to prosecute persons who attempt to detrimentally affect interstate commerce. There is no evidence nor can there be by any inference, reasonable or remote, that either Kastenbaum or Jacobs did anything that could be interpreted to affect interstate commerce in any way or degree while Casella and Kastle Tours was in operation.

Simply going on a Kastle Tour when one had come on a vacation to Miami Beach, cannot be considered an affectation of interstate commerce as indicated in the Hobbs Act. (*Rewis v. U.S.*, supra). The mailing of letters to conventioneers and the receipt of same when said conventioneers are already committed to come to Miami Beach could not affect interstate commerce in any way or degree. The forwarding of letters has never been held to put a business into interstate commerce even on a de minimis basis. Certainly the payment of money, of checks or travelers checks for the taking of a tour was never intended to be considered an affectation of interstate commerce, otherwise it would be fair to state that the giving of a check or money, no matter where committed in any of the fifty states under extortionate circumstances, would have an affect upon interstate commerce so as to make that crime federal under the Hobbs Act rather than one amenable to state process. An absurd result such as this clearly runs afoul of the principles of *Jones & Laughlin and Knapp v. Schweitzer*, supra.

Nothing, plus nothing, plus nothing, should add up to nothing.

We are willing to accept all of the cases cited by the Fifth Circuit. An analysis however, of each of these Hobbs Act cases reflect that the industry or company there under consideration, as opposed to what may be contained in the language of the opinions, unquestionably had some affect upon interstate commerce. *Esperti v. United States*, 406 F.2d 148, 150 (5th Cir., 1959); *United States v. Amabile*, 395 F.2d 304 (7th Cir. 1968) and *United States v. Battaglia*, 394 F.2d 304 (7th Cir. 1968) (extortion from a builder dependent upon interstate shipments for material); *United States v. Prano*, 385 F.2d 387 (7th Cir. 1967) (manufacturing plant using interstate material); *United States v. Kramer*, 355

Casella and Kastle Tours became non-operative because Casella could not get buses (Tr. 147) (App. 2). Casella went to a law enforcement agent (Tr. 165-168, 359-362, 625-629, 497-498) (App. 3-10) and complained of his inability to get buses and was sent to Kastenbaum to offer police money for a bus permit.

Assuming, arguendo, that a conspiracy to extort has been in being or came into being between Kastenbaum and Jacobs, how is interstate commerce affected in "any way

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F.2d 891 (7th Cir. 1966) (same); *United States v. Provenzano*, 334 F.2d 678 (3rd Cir. 1964) (interstate truck line); *Bearden v. United States*, 301 F.2d 155 (7th Cir. 1957) (interstate river travel); *United States v. Floyd*, 228 F.2d 913 (7th Cir. 1956) (interstate pipe line); *Callahan v. United States*, 223 F.2d 171 (8th Cir. 1955) (same); *Bianchi v. United States*, 219 F.2d 182 (8th Cir. 1955); *United States v. Green*, 346 F.2d 155 (7th Cir. 1957).

All of the aforesaid cases collide with the opinion of this Court in *Stirone v. United States*, 361 U.S. 212 (1960). In *Stirone*, the defendant was tried under an indictment charging obstruction of interstate commerce in the importation of building material. The trial judge permitted the case to go to the jury on the alternate theory that not only may these materials have been obstructed, but that the finally exported product may also have been. This Court reversed and, while the case is normally cited for the proposition that the proof and the charge must coincide, it must also be read to sustain the proposition that the allegations of obstructing or affecting interstate commerce mean something more than paying lip service to some words in the statute. Clearly *Stirone* follows a reasonable interpretation of the commerce clause as related to the Hobbs Act by holding fast to the proposition that there is a division of federal and state jurisdiction.

There is no suggestion, nor can there be any, that any person decided to come or not to come to Florida because of the availability or non-availability of Kastle Tours. There is no suggestion, nor can there be one, that Kastle Tours played any role in the formation of anyone's itinerary. Kastle Tours, while in operation, was distinctly local. We perceive that the true test, as outlined by the cases and especially *Esperti*, supra, is that there must be some impact upon interstate commerce in some way or degree.

The case herein is totally devoid of evidentiary support in law or fact so as to be lethal to our traditional concept of dual sovereignty.

or degree" within the intent of Congress if the conspiracy to attempt extortion or attempt to extort is not detrimental or a burden to interstate commerce, but gives Casella a new business (Tr. 302-303) (App. 1-2) that expands interstate commerce, assuming further, that the business will be considered as affecting interstate commerce in "any way or degree"?

There is no testimony or evidence that the charge of $50,000 for a bus permit is not worth the bus permit. In fact, the only testimony introduced at the trial indicated the permit necessary for the new business was worth far in excess of $50,000. (Tr. 248, 254) (App. 10). Assuming that part or all of the $50,000 was going to be used to bribe city councilmen, which is reasonable to infer from some of the evidence, there is still no effect upon interstate commerce that one could consider detrimental in any way or degree—which was the sole purpose of the Hobbs Act. *U.S. v. Local 807, International Brotherhood of Teamsters, et al.*, 315 U.S. 521 (1941). One must strain reason to understand how either Kastenbaum or Jacobs in any way did anything to detrimentally affect interstate commerce under any interpretation of the Hobbs Act.

An examination of all Hobbs Act cases will reveal not one case even close as regards the indispensable element of interstate commerce. Every Hobbs Act case involved a business in being with some act or deed of a defendant that could unquestionably be considered a burden to interstate commerce in some way or degree. (See footnote 1, *supra.*)

To amplify a fact situation that could conceivably meet a statutory construction intended to have a nexus with interstate commerce is reasonable; to explain or enlarge

upon phraseology used in a statute that could rationally meet its definitive test is also judicially permissible; but to create fiction from a statute is something this Court has always denounced. *Scales v. United States*, 367 U.S. 203, 6 L.Ed. 2d 782, 81 S.Ct. 1469. Due process requires a reasonable interpretation of the fact situation as related to effect on interstate commerce and especially where there are criminal sanctions, ambiguity is always resolved in favor of lenity. *Bell v. U.S.*, 349 U.S. 81, 83, 99 L.Ed. 905, 910, 75 S.Ct. 620 (1955).

Assuming, arguendo, that Casella and the F.B.I. agent, (posing as a transportation mogul) are extortable, and further assuming that the defendants have or are conspiring to extort from Casella and the F.B.I. agent, it was utterly impossible for there to be an effect on interstate commerce in any way or degree because the F.B.I. had removed the money necessary to obtain the permit. (Tr. 690, 864-865) (App. 14).

Going the furthest step reasonably possible and accepting the interstate jurisdictional requirement as taking into consideration that Congress also intended to prevent extortion in establishment of any future business, there still could be no effect, even de minimis, on interstate commerce since the $50,000 was removed from the vault immediately. (Tr. 864-865) (App. 14). Simple logic can only conclude that the acts of Casella in concert with the F.B.I. was to catch a "fish or two" but never to go into any business; they never intended to pay for this valuable property right and never expected it. (Appendix—page 19a of Kastenbaum's original petition for writ of certiorari) (App. 15) Hence, it was impossible for the interstate commerce jurisdictional requirement to be met even on a future potential basis.

The Legislative history of the Hobbs Act and its predecessor Case Bill, respectively passed in 1946 and 1934, clearly indicate that some reasonable effect upon interstate commerce must be shown to a business in being although we have gone further and interpreted the requirement to regulate prevention of a potential business.

None of the committee notes nor speeches on the House or Senate floor prior to passage of the Case Bill in 1934 (H.R. 32), known as the Anti-racketeering Act, could conceivably take into reasonable account the fact situation involved herein. Further, the amended Case Bill in 1946 known as the present Hobbs Act clearly indicated that it referred to a business in being: not to play acting on the part of an F.B.I. agent.

We all know that the Hobbs Act amended the Case Bill because of the Supreme Court ruling in 1942 wherein Teamster members of Local 807 were immunized from extortion because of a labor exclusion in the Case Bill. Members of Teamsters Local 807 stopped vegetable produce farmers at the New York exit of the Holland Tunnel and forced them to pay money for the "privilege" of driving the farmers' truck to market. Without elaborating on the interstate commerce aspect of that case, discussion on the House floor clearly indicates that Congress never intended to control an activity as being "in" interstate commerce where there was either "no business," or where a potential business was never actually intended.

Representative Gwynne of Iowa, a strong proponent of the Hobbs Act, stated the following in 1945 in the House debate, (House Congressional Record, page 11903):

> . . . "First they would need to prove that the activity complained of in some way affected interstate commerce; second, they would have to prove that there was an actual, not a theoretical, taking of personal property; third, they would have to prove that the taking was by violence, by personal violence, or by actual threats of personal violence; and then, fourth, they would have to prove that the acts done—they might be violent, they might take something, but the Government would have to prove in addition that the acts done did not come within the exceptions set out in title III."

None of the discussions on the House and Senate floor indicate that the fact situation involved herein was ever contemplated.

If this Court allows these convictions to stand, then any conspiracy to extort in any state is amenable to federal jurisdiction without the required interstate commerce nexus. Congress never intended this nor should this Court refuse to follow all predecessor cases holding firm to a division of federal and state jurisdiction as constitutionally sanctioned. (Comm. clause, Constitution), *United States v. Bass*, 70-71; (40 LW 4101) (1971) (not yet reported); *Rewis v. United States*, 401 U.S. 808 (1971); *Knapp v. Schweitzer*, 357 U.S. 371, 375 (1958). There is no Supreme Court case which ignores the requirement that some connection with interstate commerce, even de minimis, must be established as a basis for conviction of a federal crime where the power of Congress to enact the statute is derived from the commerce clause.

Hobbs Act cases have arisen and are numerous in all federal circuits. The reasoning of all of the various federal circuits are so divergent so as to leave the citizens of this Country without a fair warning of what the law intends in Hobbs Act cases. *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). See also *U.S. v. Cardiff*, 344 U.S. 174 (1952). It is also appropriate under our form of government for this Court to make universal or require Congress to have spoken in language that is clear and definite especially where Congress has declared criminal sanctions. *U.S. v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952).

The federal government will continue to use the Hobbs Act as a vehicle to prosecute a multitude of persons and thereby unlawfully replace state jurisdiction unless this Court clearly indicates that a reasonable interstate nexus, even de minimis, is necessary to support federal jurisdiction or in the alternative, to spell out the difference between this Court's opinion in *Stirone*, supra, and the divergent opinions of the federal circuits, although *Stirone*, *supra*, and the Circuit decisions support petitioners' jurisdictional position. (All cited in footnote #1.)

CONCLUSION

Since Congress clearly intended the Hobbs Act to free interstate commerce from *destructive* or *detrimental* effects rather than from potential benefits; and since Congress just as clearly did *not* intend the Hobbs Act to encompass the activities involved in the instant case, it is submitted that the application of the Hobbs Act herein is an unconstitutional extension of that statute, as reflected by the intervening decision of this Court in *Bass, supra*. It is therefore respectfully submitted that rehearing should be granted and a writ of certiorari should issue, as prayed in the Petition.

CERTIFICATE

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2) of the Rules of this Court.

GEORGE KASTENBAUM
in Pro Personam

NORMAN JACOBS
in Pro Personam

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT THIS 24TH DAY OF MARCH, 1972, THREE COPIES OF PETITIONERS' PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI WERE MAILED TO: ERWIN N. GRISWOLD, Solicitor General, Department of Justice, Washington, D.C. I further certify that all parties required to be served have been served.